PREME COURT, U. S.

FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

Nos. 313, 180, 197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

BOSTON AND MAINE RAILROAD, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*,

and

BOSTON AND MAINE CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*,

AMERICA CORPORATION COMMISSION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*,

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Massachusetts and the United States District Court for the District of Nebraska

MOTION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL., TO AFFIRM

HENRY BROWN
WILLIAM H. ALLEN
888 Seventeenth Street, N. W.
Washington, D. C. 20006
Attorneys for
Railroad Appellees

October 1969

TABLE OF CONTENTS

	Page
Statement	2
I. The Background of the Litigation	2
II. The Early Stages of this Proceeding	5
III. The Related Litigation Over Per Diem Charges in the Past	8
IV. The 1966 Amendment of Section 1(14)(a) of the Interstate Commerce Act and the Action Taken by the Commission Thereunder	11
V. The Commission's Report and Order	14
VI. The Proceedings in the Courts Below	16
Argument	19
I. The Commission Did Not Violate Section 1(14)(a) by Prescribing Basic Per Diem Rates Solely on the Basis of the Elements of Ownership Cost and Considering the Question of Car Supply and Incentive Payments in Separate Proceedings	20
II. The Commission Made Reasoned Findings Based On Substantial Evidence in Support of its Ultimate Conclusions as to the Return Element of Car Ownerships Costs	27
III. The Commission Had Unquestionable Authority to Determine Car Hire Rates for the Past for the Benefit of the Courts	31
IV. There is No Substance to the Massachusetts Appellants' Allegations of Defects in the Commission's Determination of the Proper Level of Past and Future Car Hire charges	35
A. The Question of the Car Repair Deficiency Setoff	35
B. The Question of the Inclusion of the Mileage Element in Car Hire Charges for the Past	38
C. The Question of the Adjustment for Inflation	39

Page

D. The Question of the Use of Average Costs 41

E. The Question of the Zone of Reasonableness 43

V. The Substitution of Hearing Examiners was Handled Properly by the Commission, and Appellants Have Alleged No Prejudice 44

Conclusion 45

Appendix 1a

INDEX TO CITATIONS

Cases:

American Commercial Lines v. Louisville and N.R.R., 392 U.S. 571 26

Baltimore & O.R.R. v. New York, N.H. & H.R.R., 196 F. Supp. 724 (S.D.N.Y. 1961) 9

Boston & Me. Corp. v. Illinois Central R.R., 274 F. Supp. 257 (S.D.N.Y. 1967), *aff'd*, 396 F.2d 425 (2d Cir. 1968) 10

Boston & Me. R.R. v. United States, 162 F. Supp. 289 (D. Mass. 1958) 6, 11

Boston & Me. R.R. v. United States, 358 U.S. 68 ..... 6, 7, 8, 32

CAB v. State Airlines, 338 U.S. 572 28

Chicago, R.I. & P. Ry. v. United States, 284 U.S. 80 11

El Dorado Oil Works v. United States, 382 U.S. 12 ..33, 34

FPC v. Natural Gas Pipeline Co., 315 U.S. 575 26

FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 26

General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 ..... 33, 34

New England Divisions Case, 261 U.S. 184 ..... 26, 42

New York v. United States, 331 U.S. 284 26

Palmer v. United States, 75 F. Supp. 63 (D.D.C. 1947) 11, 23

SEC v. Drexel Co., 348 U.S. 341 26

United States v. Abilene & So. Ry., 265 U.S. 274 42

Page

ICC PROCEEDINGS:

Alabama, T. & N. R.R. v. Aberdeen & R. R.R., 274 I.C.C. 383 (1949) 4
Association of American Railroads—Agreement, 277 I.C.C. 413 (1950) 3
Chicago, B. & Q. R.R. v. New York, S. & Western R.R., 297 I.C.C. 291 (1955) 5, 6
Chicago, B. & Q. R.R. v. New York, S. & Western R.R., 332 I.C.C. 176 (1968) 2, 10, 14, 15, 16, 28, 29, 30, 31, 33, 36, 37, 39, 40, 41
Investigation of Adequacy of Railroad Freight Car Ownership, Car Utilization, Distribution, Rules and Practices, 335 I.C.C. 264 (1969) 13
Incentive Per Diem Charges, 332 I.C.C. 11 (1967) 12, 22, 23
Keith Ry. Equip. Co. v. Association of American Railroads, 274 I.C.C. 469 (1949) 41, 42
Virginia Blue Ridge Ry. v. Southern Ry., 96 I.C.C. 591 (1925) 11

STATUTES:

Administrative Procedure Act

§ 5(d) 5
5 U.S.C. § 556(b) 44
5 U.S.C. § 3105 45

Interstate Commerce Act

§ 1 13
§ 1(10) 33
§ 1(11) 31, 33
§ 1(14)(a) 5, 7, 11, 14, 18, 20, 22, 23, 26, 31, 33, 34, 35
§ 5a 3
§ 12 13
§ 20 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 343, 480, 497

BOSTON AND MAINE RAILROAD, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*,

and

BOSTON AND MAINE CORPORATION, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees*.

ARIZONA CORPORATION COMMISSION, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

UNION PACIFIC RAILROAD COMPANY, ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal from the United States District Court for the District of Massachusetts and the United States District Court for the District of Nebraska

MOTION OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, ET AL. TO AFFIRM

Pursuant to Rule 16(1)(e) of the Rules of this Court appellees Chicago and North Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Rail-

road Company, Lehigh Valley Railroad Company, Penn Central Transportation Company, The Pittsburgh & Lake Erie Railroad Company and Southern Railway System move that the judgments of the district courts in these cases be affirmed on the ground that the questions presented are so lacking in substance as not to warrant further briefing or oral argument.

STATEMENT

I. The Background of the Litigation

These are appeals from the judgments of two district courts that sustained an order of the Interstate Commerce Commission dealing with the amount of the charges to be paid by railroads for their use of one another's freight cars. *Chicago, B & Q.R.R. v. New York, S. & Western R.R.*, 332 I.C.C. 176 (1968).[1] These appeals are the latest stage in a controversy that has embroiled the railroads of the United States for more than 20 years and given rise to protracted litigation before the Interstate Commerce Commission and the courts. The proceedings that culminated in the Commission's order began in 1953.

The interchange of freight cars among the railroads of the United States is both a practical necessity and a legal obligation under the Interstate Commerce Act. As an incident to through movements of freight, almost every railroad in the country both owns freight cars that are sometimes on the lines of other railroads

[1] The Commission's report and order are reproduced in Appendix E to the Jurisdictional Statement in No. 343 and Appendix E of the Joint Appendix to the Jurisdictional Statements in Nos. 480 and 497. Citations herein will be to the appropriate pages of Volume 332 of the I.C.C. reports; there is parallel pagination in both appendices.

and uses on its lines cars of other railroads.[2] Arrangements for determining the amounts that railroads will pay for the use of freight cars owned by other railroads are therefore necessary. For more than 50 years these amounts—which are often called "per diem" payments[3]—were established by agreement among the railroads under the sponsorship of and in accordance with procedures adopted by industry associations.[4] In 1949 the procedures for establishing per diem charges were embodied in an agreement among the members of the Association of American Railroads that the Commission approved, subject to certain conditions, pursuant to Section 5a of the Interstate Commerce Act. *Association of American Railroads—Agreement*, 277 I.C.C. 413 (1950).

From 1920 until approximately the end of the second World War the per diem charge was fixed at $1 a day. Beginning in 1945 because of increasing costs the rate was steadily increased. Between 1945 and 1959 the rate rose by stages from $1 a day to $2.88 a day. The $2.88 rate prevailed until 1964 when a multi-level system of rates varying according to the age and cost of cars was instituted.

As a result of the increases in the post-war period a controversy developed among the railroads over the

[2] These railroad appellees are important car owners as well as users. On March 31, 1964, which is the last date of record, these appellees together owned 109,662 per diem freight cars, 26.4% of the total of such cars owned by Class I railroads. (Exhibit R-181).

[3] The use of the term "per diem" arose because beginning in 1902 the charges were calculated solely on the basis of the time a car was on the line of the using railroad. The charges are sometimes referred to as "car hire" rates. The two terms will be used interchangeably herein.

[4] Since 1934, the Association of American Railroads; prior to that year, certain predecessor organizations.

level of the per diem charges. While many of the roads accepted as satisfactory the per diem charges established pursuant to the industry arrangement, others took the position that the charges were too high, while still others, notably certain western carriers that are now appellants in No. 194, maintained that they were too low. For many years the appellants in No. 343 have contended that the AAR rates have been and are too high.

Until 1951 all railroads, including the few that were not signatories of the industry agreement, made per diem payments on the basis established by that agreement. In that year one railroad that was not a party to the agreement and is not now involved in the litigation announced that it would no longer pay the established per diem rate, but would settle its accounts at a lower rate that it tendered to other railroads. In 1953 the Boston & Maine Railroad, the New York, New Haven & Hartford Railroad and certain other lines that are among the appellants in No. 343 withdrew from the agreement and announced that they would no longer pay the rate established pursuant to the agreement but would settle per diem accounts at a lower rate which they proposed to other carriers. The carriers

6

This difference is cited in the District Court opinion in the instant T. & N. Ry. v. Gordon, 116 F. Supp. 113, 115 (1953). In July 1954 a number of railroads complained to the Commission that the per diem rates were unjust and unreasonable to the extent that they exceeded certain rates. The latter railroads, including the appellants in No. 194, contended that the per diem rate was inconsistent with the requirements of section 1 (14) (a) of the Interstate Commerce Act that per diem rates be reasonable, equal and non-discriminatory. After a hearing the Commission found that the per diem charges were not shown to have been or to be unreasonable per se and that the investment per diem rate was not shown to be unreasonably low and denied the complaints. 11 I.C.C. 101.

II. The Early Stages of This Proceeding

sation "for present use." It also found that lower charges would not be compensatory either for the present or for the past. *Chicago, B. & Q. R. R. v. New York, N. H. & Western R. R.*, 297 I. C. C. 294, 308 (1955).

In November 1956, after a denial of rehearing by the Commission, a number of railroads, including the present appellant in No. 111, brought suit in the District Court for the District of Massachusetts attacking the Commission's order. They contended, among other things, that the Commission had no authority to issue a declaratory order dealing with the legality of per diem payments for past periods. The district court rejected that contention but set aside the Commission's order on other grounds. *Boston & Me. R. R. v. United States*, 162 F. Supp. 280 (D. Mass. 1958). The district court "based its decision on the Commission's summary rejection of an alternative method of computation which would introduce a mileage factor into the *per diem*, advocated by certain of the terminal roads." *Boston & Me. R. R. v. United States*, 356 U. S. 38, 39; see 162 F. Supp. at 297-98. In addition, the district court, for the guidance of the Commission on remand, pointed out certain errors that it believed the Commission had made in considering some of the components of costs that enter into the determination of a proper car hire charge. 162 F. Supp. at 295-97. Cross appeals were taken to this Court. The plaintiff railroads appealed on the ground that the district court erroneously rejected their contention that the Commission had no authority to issue a declaratory order with respect to the legality of per diem payments for past periods. On this Court the Commission urged

The Commission's report is reproduced in Appendix B to the Jurisdictional Statement in No. 111.

noted that it was proposed to proceed in accordance with the terms of the district court's remand, and on that basis the Court dismissed both appeals. *Boston & Me. R.R. v. United States*, 398 U.S. 68, 71-72.

Pursuant to the remand the Commission on March 24, 1969, re-opened the original proceeding for further hearings. On July 24, 1969, the Commission expanded the scope of the original proceeding by initiating another proceeding, ID 5ubNo. 293(5), in which it took two steps: it exercised its authority under Section 20 of the Act to require detailed reports from all railroads to facilitate a more accurate computation of per diem charges; and it instituted an investigation under Section 15 (1) (a) to ascertain whether there was a need to establish reasonable rules, regulations and practices governing the determination of car hire rates for all railroads in the future. All rail carriers subject to Part I of the Interstate Commerce Act were made parties, and the new proceeding was consolidated with the previously completed proceeding that had been remanded.

The Commission directed its Cost Section to secure and develop pertinent cost data, including cost allocations on a time and mileage basis. The problems of developing car costs on a particularized basis and allocating those costs partly on a time factor and partly on a mileage factor were formidable. It required three years for the Commission's Cost Section, with the cooperation of the railroads, to complete its cost study and propose a proposed formula for computing car hire charges for the future.

The cost study became the principal subject matter of the hearings in the consolidated proceedings, which

began in January 1963 and extended into 1964.[5] There were more than 50 days of hearings, and the record included more than 10,000 pages of transcript and approximately 100 exhibits. The examiner issued a detailed and voluminous recommended report and order in December 1965.[6] Thereafter the case was briefed before the full Commission, which on January 30, 1968, issued the report and order here involved.

An understanding of certain events outside the per diem proceedings that occurred after the district court's remand is necessary to an understanding of the Commission's final election in the reopened and consolidated proceedings.

III. The Related Litigation Over Per Diem Charges in the Past

The question of the Commission's authority to issue a declaratory order with respect to the legality of per diem payments for the past was not finally determined on review of the Commission's first order. This Court dismissed the appeal of the plaintiff railroads without prejudice to review of that issue "if it survives the further Commission proceedings." 385 U.S. at 72. The railroads that had sought declaratory relief from the Commission recognized that if it were ultimately determined that the Commission had no authority to grant that relief they would be remitted to whatever rights they might have on the basis of contract or quantum meruit. To protect these rights, numerous railroads in 1959 brought 109 separate suits in the

[5] In the course of the hearings the Southern Railway System filed a complaint against the existing multi-level per diem rates (Docket 34036). It was consolidated with the other per diem proceedings.

[6] Appendix D to the Jurisdictional Statement in No. 110.

District Court for the Southern District of New York against the Boston & Maine and the New Haven to recover, either on contract or quantum meruit, per diem balances determined on the basis of the rates established for past periods pursuant to the industry agreement.[6] The two defendants answered by alleging, among other things, that the established per diem rates were unreasonably high, and they counterclaimed for the difference between any amounts they had actually paid and any lesser amounts that might be found reasonable.

In July 1961 the district court held that the plaintiffs were entitled to a partial interlocutory summary judgment that would adjudge that the plaintiffs were entitled "to recover from defendants per diem rates in such amounts as are to be ultimately determined to be due them by this Court based upon a rate fixed by the Commission and the Court or by the Court alone." *Baltimore & O.R.R. v. New York, N.H. & H.R.R.*, 196 F. Supp. 724, 749 (S.D.N.Y. 1961). On June 15, 1962, the district court entered a judgment in conformity with its opinion, which is reproduced in its entirety as an appendix to this motion, *infra*.[7] The judgment directed the plaintiffs

[6] The suits sought recovery for a period beginning August 1, 1956.

[7] The district court's judgment provided that the plaintiffs shall have partial judgments in their favor as to the liability of the defendants to said plaintiffs for the certain offs of the grams and adjudging that those plaintiffs are entitled to recover from defendants per diem in such amounts as are found by this Court to be due them based upon a rate to be fixed just, fair, reasonable and remunerative contained in the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court, for each month beginning with August 1956 to date. [illegible] See p. 30 *infra*.

that were complainants in the proceeding before the Commission to amend their pleadings to request the Commission "without regard to the proceeding pending in Docket No. 33145 to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with August 1953 to date; . . ." The order also directed any plaintiffs that were not parties to the proceeding before the Commission to petition the Commission for leave to intervene for the purpose of making the same request. The plaintiff railroads complied with these directions, and in December 1962 the Commission permitted the requested amendments and interventions.

A similar situation arose in litigation in the New York Supreme Court, New York County, involving the Illinois Central Company. There the Boston & Maine and the New Haven each sued the Illinois Central in 1959 for interline freight balances, and the Illinois Central counterclaimed for per diem balances on the basis of the rates established under the mileage agreement. The state court denied a Boston & Maine motion to dismiss the counterclaim and for summary judgment and deferred ruling on the counterclaim to await advice from the Commission as to what per diem rates would be lawful for the period involved. (See 332 I.C.C. at 181-82.)

[illegible] Subsequently the Boston & Maine invoked its mandatory arbitration rules of the Association of American Railroads and in the arbitration obtained an award holding that under the accounting rules of the AAR it was necessary to set off the Illinois per diem balances against the interline freight balances. This award was upheld. Boston & Maine Corp. v. Illinois Central R.R. Co., [illegible] N.Y. [illegible]

IV. The 1966 Amendment of Section 1(14)(a) of the Interstate Commerce Act and the Action Taken by the Commission Thereunder

Prior to 1966 the Commission was authorized by Section 1(14)(a) to prescribe compensation to be paid by one railroad for the use of the freight car of another solely on the basis of the elements of ownership expense, including, among other things, maintenance costs, depreciation, taxes and a fair return on value. Thus, in fixing per diem rates the Commission was not authorized to add to the costs of ownership any amount designed to operate as an incentive to car ownership or to achieve any other similar collateral regulatory purpose. *Palmer v. United States*, 75 F. Supp. 63 (D.D.C. 1947); *Boston & Me. R.R. v. United States*, 162 F. Supp. 289, 295 (D. Mass. 1958), *appeal dismissed*, 358 U.S. 68.[9]

On May 26, 1966, Congress amended Section 1(14)(a) in a way that expanded the authority of the Commission under the section. The amendment provided in substance that the Commission, in exercising its authority to fix compensation to be paid for the use of "any type of freight car," should give consideration to the national level of ownership of the type of freight car involved and to other factors affecting the adequacy of the national freight car supply and, on the basis of that consideration, determine whether the charges should be computed solely on the basis of elements of ownership expense or should be increased by an incentive element. (See pp. 20-27, *infra*.)

[9] See the definition of "per diem" in *Virginia Blue Ridge Ry. v. Southern Ry.*, 96 I.C.C. 501, 512-513, quoted with approval in *Chicago R.I. & P. Ry. v. United States*, 284 U.S. 80, 97.

The Commission acted promptly to exercise the authority conferred upon it by the amendment. On June 23, 1966, less than a month after the enactment of the amendment and well in advance of the date on which it was to become effective (September 1, 1966), the Commission initiated a proceeding designated as Ex Parte No. 253, *Incentive Per Diem Charges*.[1] The purpose of this proceeding was to enable the Commission to determine "whether information presently available warranted the establishment of an incentive element increase, or an interim basis, to apply pending further study and investigation." 332 I.C.C. at 12. All common carriers by railroad subject to the Interstate Commerce Act were made parties to the proceeding, and hearings were held in November and December 1966 and April 1967. In that proceeding a number of the appellants in No. 197 took the position that the Commission should establish basic per diem rates based on the cost of ownership before determining whether the basic rate should be increased by some incentive element. (See p. 25 n. 23, *infra*.)

On October 26, 1967, the Commission issued its report in *Incentive Per Diem Charges*, 332 I.C.C. 11. In that report the Commission found:

> "Despite participation by 189 of the Nation's railroads, the most thorough presentation of information and argument ever made to this Commission, and the most diligent search of our own files, we have been unable to find sufficient evidence to meet the statutory standard, and we conclude that the information necessary to this decision is not presently available." *Id.* at 16.

[1] On June 20, 1966, section 4(b) of the Act of June 20, 1966, Pub. L. 89-430, 80 Stat. 208, required the Commission to "open that proceeding for the purpose of considering incentive increases." The Commission denied that petition. See 332 I.C.C. 11, 12.

The Commission also stated:

> "We find, upon consideration of the record herein, after collecting the oral and advice of all railroads subject to our jurisdiction, and of other interested parties, that there is not available at this time reliable factual data which would enable this Commission to comply with the statutory requirements and make a valid decision as to the imposition of an incentive charge." *Id.* at 18.

On the basis of these findings the Commission concluded that no incentive per diem charge should be imposed at that time but that a further investigation should be conducted and further proceedings held with regard to the question of an incentive per diem charge. Judicial review of the Commission's action was not sought. On December 23, 1967, the Commission instituted another proceeding designated as Ex Parte No. 252, Sub. No. 1, *Incentive Per Diem Charges—1968*, for the purpose of determining whether an incentive per diem charge should be imposed. That proceeding is still pending.

V. The Commission's Report and Order

In its report in the per diem case the Commission reviewed and analyzed the evidence in detail and made findings on all of the material issues raised by the parties. In its review of the evidence and in its findings the Commission took full account of the criticisms made by the district court on review of its prior order relating to such matters as depreciation, car repair costs and the proper "car day divisor." On the basis of its findings the Commission made determinations with respect to car hire charges, both for the future and for the past.

For the future the Commission exercised its powers under Section 1(11)(a) and prescribed a method of calculating car hire charges that would be just and reasonable. 332 I.C.C. at 230-31.[9] In doing so the Commission departed from a straight time charge and introduced a mileage element, finding that "reasonable compensation to car owners requires that all ownership costs be distributed among and borne equitably among all railroads making use of such cars in just proportion to the amount of use, that the use

[9] The method is to be applied on and after the effective date of the Commission's order, which was originally fixed as October 1, 1969. Thereafter the Commission extended the effective date to November 15, 1969. After the District Court for the District of Nebraska granted a preliminary injunction pending review of the order, the Commission postponed the effective date until further order. After the Nebraska court upheld the Commission's order the order was reinstated, effective August 1, 1969. The Nebraska court has stayed this order pending this appeal but excepted from its stay that part of the Commission's order that required the railroads to maintain both time and mileage records for the use of each other's cars after August 1, 1969, so that adjustments of car hire payments from that date might be made if its decision is affirmed by this court.

made of cars must be measured by both the length of time cars are held and the amount of activity to which they are subjected, and that the most practicable and reliable method of measuring car activity is the line-haul mileage over which they are moved." *Id.* at 26 (paragraph 6).

In making its determination relating to per diem charges for the past, the Commission recognized that it was not exercising an independent regulatory power to prescribe rail line charges, but instead was responding to the request for advice that it had received from the District Court for the Southern District of New York, and that its determinations would be germane and only as aid and [illegible] that court and to the New York state court in determining the amounts recoverable in the litigation pending in those courts. 1981 I.C.C. at 185, 186.

With respect to post per diem rates, the Commission made the following findings: (1) it found that the per diem rates established pursuant to the industry agreement from and after August 1, 1964, had not been shown to be lawful; (2) it stated a specific per diem rate for each year from 1964 through 1965 that it found would be reasonable and otherwise lawful for the purpose of setting per diem

balances between the parties to the pending litigation [18] (*id.* at 256, 257); and (3) it determined that for any year after 1965, and until the effective date of the rates prescribed for the future, lawful per diem rates, for the purpose of settling such per diem balances, would be those ascertained by the methods employed by the Commission to calculate the per diem rates found reasonable for prior years (*id.* at 257-58).

VI. The Proceedings in the Courts Below

Two different groups of plaintiffs brought actions attacking the Commission's order of January 17, 1968, in two different jurisdictions—the District Court for the District of Massachusetts, which had reviewed the first order of the Commission, and the District Court for the District of Nebraska.

The action in the District of Massachusetts was brought by the Boston & Maine, the New Haven, the Long Island Railroad and certain terminal and switching railroads (the Massachusetts appellants). The basic contention of those railroads was that both the per diem rates determined by the Commission to be reasonable for the past and those it prescribed as reasonable for the future are too high. They did not raise in the Massachusetts court, as they seek to do

---

[18] In determining these rates the Commission found that the record did not contain evidence that would enable it to make any reliable estimate as to the distribution of costs between time and mileage in the past. In its computation of these charges it therefore did not use any mileage element. (See pp. 38-39, *infra*).

The rates determined by the Commission to be lawful for the past periods were lower than the rates established under the industry agreement for those periods but generally higher than the rates that the dissident railroads had indicated they would be willing to pay.

here, the question whether the Commission was authorized to respond to the request of the District Court for the Southern District of New York for advice concerning lawful per diem rates for past periods of time. (See pp. 31-35, *infra.*) Their attack was directed against the Commission's findings on a number of issues involved in its determination of the costs of car ownership. Their arguments, which are discussed at pages 35-45 below, included, among other things, charges that the Commission had erred in its treatment of the so-called car repair deficiency, in failing to include a mileage element in determining per diem rates for the past, and in measuring the effect of inflation on costs by an index of freight car costs instead of a general wholesale price index. The district court, which included the two judges who had joined in setting aside the Commission's first order, unanimously rejected all of these arguments, sustained the Commission's order and dismissed the complaint. At the end of its opinion the district court stated:

> "In conclusion it will suffice to say that in our view the Commission has dealt thoroughly with a highly complex problem and after full and painstaking study has come up with a rational and fair solution as simple and convenient as the intricacy of the problem permits." (Appendix F to Jurisdictional Statement, No. 343, p. F9).

The action in the District of Nebraska was brought by 22 Class I railroads that are net car hire creditors and that, because of the weighting of votes according to the number of cars owned, have been able to dominate the industry committee which has set car hire rates.

Their attack was directed against the car hire payments prescribed by the Commission for application in

the future.[19] The principal basis for the attack was an argument that because of the 1966 amendment of Section 1(14) (a) of the Act the Commission could not lawfully prescribe a basic per diem rate based solely on the costs of ownership but was required at the same time and in the same proceeding to determine whether incentive elements should be added to the basic per diem rates in order to encourage car ownership. In support of this position it was argued that the Commission had disregarded the statutory command by considering the issue of incentive payments in a separate proceeding and deferring a determination of that issue until it had collected and analyzed the information it deemed necessary for an intelligent decision. Specifically, the Nebraska appellants attacked the Commission for having included a mileage element in the formula used to determine reasonable car hire rates for the future, arguing that a time-mileage formula would have an adverse effect on car supply. They also argued that the Commission had erred in its findings concerning the appropriate rate of return to car-owning railroads on their investment in freight cars.

The Nebraska District Court, with one judge dissenting, rejected these arguments.[20] The principal opinion, written by District Judge Robinson, held that the 1966 amendment did not deprive the Commission of authority to prescribe compensatory or basic per diem rates solely on the basis of costs and that the Commis-

---

[19] This description also covers the states that intervened in the Nebraska action and that are appellants in No. 480 in support of the plaintiff railroads.

[20] The opinions are reproduced as Appendix A in the Joint Appendix to the Jurisdictional Statements in Nos. 480 and 497, pp. 1a-36a.

sion had discharged its obligations under the statute by considering whether an incentive element should be added to the basic per diem charge in the separate proceeding instituted for that purpose and by deciding in that proceeding to defer the resolution of the question pending the collection and analysis of the relevant facts. In a concurring opinion, Circuit Judge Ley similarly held that the Commission had substantially complied with the mandate of the 1966 amendment by establishing in the first instance a basic per diem rate and deferring judgment as to the addition of any incentive element until facts necessary for that determination could be obtained. Judge Ley also pointed out that a remand would not accomplish any meaningful purpose "but would simply delay the effective date of the new per diem rates" and would result in "the continued use of the older and inferior method of per diem charges." (Jt. Appendix to Jurisdictional Statements in Nos. 480 and 497, p. 32a). The dissenting judge was District Judge Van Pelt, who said that the Commission was bound to consider basic per diem rates and incentive rates in the same proceeding.

ARGUMENT

These appeals raise no questions that deserve plenary review by this Court. The Commission's determination of reasonable per diem rates for the past and its prescription of reasonable rates for the future rest upon reasoned findings that are supported by substantial evidence. The findings are the result of a detailed and painstaking investigation and appraisal of the facts relating to the costs of car ownership, and they reflect the analysis and recommendations of the Commission's own Cost Section. In a real sense, therefore, the findings embody the informed and expert

judgment of the Commission on issues that fall within its administrative competence.

Given the intricacies of the car hire problem and the conflicts among the carriers involved, it may be that no administrative or judicial action can satisfy all sides. Indeed, the Commission in significant respects rejected arguments of these appellees that they believed to be meritorious. If, however, the Commission's order here is sustained it will facilitate a fair and orderly disposition of the quarrels of the past and establish for the future uniform basic car hire rates that fairly reflect the costs of ownership and thus remove most if not all of the confusion and controversy that have plagued the railroad industry for many years.

The circumstances, therefore, call for a prompt disposition of these appeals unless the appellants show that they present genuine and substantial questions of law that justify extensive briefs and oral argument. The appellants have not made this showing.

We shall undertake to demonstrate this in what follows, addressing ourselves first to the arguments of the Nebraska appellants and then to the arguments of the Massachusetts appellants.

I. The Commission Did Not Violate Section 1(14)(a) by Prescribing Basic Per Diem Rates Solely on the Basis of the Elements of Ownership Cost and Considering the Question of Car Supply and Incentive Payments in Separate Proceedings

The Nebraska appellants contend that the Commission violated Section 1(14)(a) of the Interstate Commerce Act by prescribing basic car hire rates for the future for all freight cars solely on the basis of the

costs of ownership and without giving consideration to evidence relevant to the effect of the rates on car supply. Specifically they attack the Commission for using a time-and-mileage formula instead of a straight time formula; they allege that this will have a "serious impact" upon car supply. (Jurisdictional Statement, No. 497, pp. 14-18).

The Nebraska appellants do not contend that the evidence as to the costs of car ownership does not justify the use of a mileage factor in prescribing car hire rates that are based upon costs. The Commission carefully considered, as it had been directed to do so by the Massachusetts District Court, whether there should be a time-mileage formula in order to provide as accurately as possible for reimbursement by various car users of actual ownership costs. It concluded that there should be a time-mileage formula. In terms the Nebraska appellants go no further in their Jurisdictional Statement than to urge that the Commission erred in failing to consider the effect of its adoption of a time-mileage formula on car supply. Presumably, however, this argument is designed to impel the Commission to take some action based on its consideration of car supply—either to revert to a time measure alone or at least to alter the time-mileage formula substantially even though the time-mileage formula adopted is solidly grounded in the cost evidence of record. The appellants are ultimately urging, therefore, that the Commission was bound to determine in the proceedings before this Court whether incentive car hire rates—rates that will do more than provide reimbursement of car owners for their costs by charges that are equitably shared by car users—are required by car supply considerations and, if they are, to prescribe

them in substitution for or in addition to the cost-based car hire rates the Commission did fix. There is no warrant for that position in Section 1(14)(a) of the Act as amended in 1966.

It is not disputed that the Commission gave consideration to car supply and the kind of incentive payments the Nebraska appellants seek in the separate proceeding, Ex Parte No. 252, that led to its report in *Incentive Per Diem Charges,* 332 I.C.C. 11 (1967), which was issued prior to the order here involved. In that report the Commission found that at the present time it did not have the information necessary to determine whether considerations of car supply required incentive payments; it declined to act on "conjecture." Accordingly, the Commission thereafter instituted further proceedings, which are still in progress, for the purpose of obtaining information necessary for intelligent action on the question of incentive payments. 332 I.C.C. at 16-17. (See pp. 12-13, *supra*). The Nebraska appellants did not seek judicial review of this action by the Commission and do not now suggest that it was not justified on the record.[21]

---

[21] All of the carriers that are appellants in No. 497 had a full opportunity in Ex Parte No. 252 to present any relevant evidence to the Commission. It is significant that in its report the Commission found:

> "The evidence presented by the respondents in this proceeding is substantially unanimous that (1) present operating practices would not be improved (2) nor would more effective use be made of freight cars (3) nor would the building of more freight cars be generated as a result of applying an interim incentive charge. The appreciable differences which now exist between charges for cars of varying value under the multi-level per diem rate schedules do not result in distinctions of efficient use between the higher and lower rated cars and we are not satisfied, on this record, that addition of

There is thus no basis for any argument that the Commission has simply disregarded questions of car supply and incentive payments. The position of the Nebraska appellants must therefore be either that any basic per diem rate applicable to all freight cars must necessarily reflect both cost and incentive elements, or that by reason of the amendment to Section 1(14)(a) the Commission cannot prescribe basic rates for all freight cars unless at the same time and in the same proceeding it considers and deals with the question of incentive payments.[22] The statute provides no warrant for either position.

---

an interim incentive charge would have any greater impact." 332 I.C.C. at 16.

This finding does not preclude the possibility that upon the further investigation that the Commission is now conducting it may obtain evidence that will justify the imposition of an incentive payment. It does indicate, however, that the appellant carriers in No. 497 presented no evidence to the Commission that would justify such payments at this time.

[22] The first position is suggested by the attempt of the Nebraska appellants to derive support from one passage in Palmer v. United States, 75 F. Supp. 63, 68 (D.D.C. 1947). They appear to argue that the passage held that even before § 1(14)(a) was amended the Commission, in prescribing per diem rates, was required to give weight to questions of car supply. (Jurisdictional Statement, No. 497, p. 17.) This is an inadmissible reading of the court's remark; read in context it merely makes the obvious point that a per diem charge that properly reflects the costs of ownership but is based on time alone is not unlawful because it may have the collateral effect of encouraging the prompt return of cars. Contrary to appellants' contention, the court in that case squarely held that under the law as it then stood the Commission could not lawfully include in the per diem charge any amount designed as a stimulant to the prompt handling and return of cars. The court pointed out:

> "In fact, it is agreed that the Commission has never heretofore in thirty years attempted to include in the per diem charge any extra amount intended for a purely regulatory purpose." 75 F. Supp. at 68.

The amendment directs the Commission in prescribing car hire rates for "any type of freight car" to "give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply." The operative obligation imposed upon the Commission by this direction is to determine

> "on the basis of such consideration whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense."

And significantly the amended section provides that the Commission shall not make incentive elements applicable to "any type of freight car the supply of which the Commission finds to be adequate" and that the Commission may exempt from payment of the incentive charges any group of carriers if the Commission finds that to be in the national interest.

The language of the amendment thus plainly recognizes the distinction between basic per diem charges "computed solely on the basis of elements of ownership expense" and applicable to all railroads and all types of freight cars, on the one hand, and incentive payments, which are increases in or additions to the basic per diem charges, which are subject to different standards and limitations, and which are not necessarily

applicable to all types of freight cars and all carriers, on the other. Nothing in this language can be read as requiring the Commission to fix basic per diem rates applicable to all cars and all carriers that reflect both ownership costs and incentive elements, or as imposing upon the Commission an absolute obligation to deal with basic per diem rates and incentive payments at the same time, in the same proceeding and in a single order.

In particular, there is no substance to the Nebraska appellants' plaint that the impact on car supply of the time-mileage system prescribed by the Commission "falls between two chairs" because it was not considered in the proceedings before the Court or in the incentive per diem case. (Jurisdictional Statement, No. 497, p. 16). If a time-mileage system is necessary or appropriate accurately to apportion reimbursable car ownership costs among users, as the Commission found, the statute plainly contemplates its use in the prescription of basic car hire rates for all freight cars. If the supply of a type of freight car is found inadequate, then the Commission may increase the basic compensation provided by the time-mileage formula by incentive elements. At neither stage is the impact on car supply of the time-mileage system necessarily relevant. The failure to consider the supposed impact of a time-mileage formula on car supply in the proceedings before the Court will in no way hinder the Commission in the pending incentive proceeding from determining whether, for any type of car, incentive rates are needed to ensure an adequate supply and, if they are found needed, from prescribing such incentive rates.

The reading of the amendment just urged is supported by its legislative history, which is discussed in

detail in the opinion of District Judge Robinson in the Nebraska case. (Jt. Appendix to Jurisdictional Statements, Nos. 480 and 497, pp. 14a-19a). That history may be summarized as showing that Congress deliberately rejected a proposal that would have required the Commission to provide for an incentive element in a single general proceeding directed to the fixing of basic compensation for all types of freight cars.

In the instant case the Commission fully complied with both the letter and the purpose of amended Section 1(14)(a). It considered questions of car supply and incentive payments in a proceeding instituted for that purpose, found that the information necessary for an intelligent determination of those questions was not then available and is now engaged in a continuing investigation of the relevant facts. The appellants had and have a full opportunity to participate in that proceeding and to present to the Commission any evidance that they believe justifies the imposition of incentive charges. The fact that the Commission took these steps in a separate and independent proceeding involves no breach of statutory duty or abuse of discretion. This Court has long held that an agency has discretionary authority to approach and to deal with a complex regulatory problem in logical steps. *American-Commerical Lines* v. *Louisville and N. R.R.*, 392 U.S. 571; *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 150, 153-54; *SEC* v. *Drexel Co.*, 348 U.S. 341, 346-47; *New York* v. *United States*, 331 U.S. 284, 343; *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85; *New England Divisions Case*, 261 U.S. 184, 200-01.

There are powerful considerations that support the wisdom of the course that the Commission followed.

Since the basic per diem rates have been in dispute in the industry for many years and since any incentive payments would be additions to the basic per diem rates it was both sensible and logical for the Commission to deal with the basic per diem rates as soon as that question was ripe for decision. In this connection, it may be noted that in the incentive per diem charges case a number of the Nebraska appellants urged that no decision should be reached with respect to incentive payments until the Commission had first prescribed the basic per diem rates.[23]

II. The Commission Made Reasoned Findings Based on Substantial Evidence in Support of Its Ultimate Conclusions as to the Return Element of Car Ownership Costs

The Nebraska appellants also urge that in determining the return element of freight car ownership costs the Commission did not make reasoned findings based upon substantial evidence.

In part their argument on this score relates to the fact that the Commission devised its own formula for computing the rate at which a car owner should be

---

[23] See, *e.g.*, Brief of Missouri Pacific R.R., filed May 29, 1967, p. 12 ("Before the Commission proceeds to determine the need for incentive per diem it should first determine the basic compensation in the pending dockets 33145 and 34405."); Brief of Norfolk & Western Ry., filed May 29, 1967, p. 3 ("[T]o try to formulate incentive per diem before the basic per diem rates are resolved seems somewhat like trying to design the arch of a bridge without any information as to the foundation."); Joint Brief for the Atchison, Topeka and Santa Fe Ry., the Baltimore and O. R.R., the Chesapeake & Ohio Ry., the Denver and Rio Grande Western R.R., Great Northern Ry., Illinois Central R.R., Northern Pacific Ry., and Western Maryland Ry., filed May 28, 1967, p. 3 ("Before exercising its incentive per diem power the Commission must exercise its regular per diem power by establishing reasonable rules and regulations with respect to fixing basic per diem rates.")

compensated for what it spends and borrows to buy its car instead of accepting in its entirety any of the formulas offered by the parties or the formula adopted by its hearing examiner. There is nothing in the requirement of substantial evidentiary support for agency findings that forecloses an agency from taking, on the basis of evidence, an approach not suggested by any of the parties. That is what the Commission did here. An agency is not supposed to be the prisoner of the contentions addressed to it by the parties. *Cf. CAB* v. *State Airlines*, 338 U.S. 572.

The Commission arrived at an interest rate or return element of 6 percent before federal income taxes on the undepreciated balance of the original cost of a freight car. This figure resulted from allowing to the owner an interest rate of 4 percent on 60 percent of the original cost, representing what is financed through equipment trust obligations or similar secured debt instruments, and 9 percent on the remaining 40 percent, representing the cost to the car owner of its own investment with an allowance for the loss in purchasing power of the dollar. (332 I.C.C. at 211-13).

Besides the general assertion that the Commission's conclusions "were not supported by any evidence" because the Commission used methods that had not been advocated by the parties or the Commission's staff, the Nebraska appellants make two specific allegations. One is that the return "is plainly inadequate where the interest on debt alone exceeded 6 percent when the record was made, and now exceeds 8 percent." (Jurisdictional Statement, No. 497, p. 19). This is an argument that the Commission was bound to rely upon a transitory phenomenon, the abnormally high interest rates of the last two years, instead of the evidence of record. The evidence of record was that the

average interest rate on outstanding equipment obligations—and these are the relevant debt instruments in this case since it is through them that freight cars are financed—was 3.849 percent during the period that was the subject of the Commission's elaborate cost study. (332 I.C.C. at 213). Moreover, much of this cost of debt is an embedded cost. The Commission found that one-fifth of the freight cars in interchange service as of January 1, 1962, were more than 30 years old, a proportion that had increased slightly since 10 years earlier; and that of all cars in service on January 1, 1962, nearly 38 percent were over 20 years old and more than 49 percent were over 15 years old. (*Id.* at 196). In the circumstances it would have been irrational for the Commission to ignore the cost of outstanding debt shown on the record and rely upon current interest rates. In any event, there is no evidence whatever by how much, if at all, interest rates on equipment obligations had increased at the time the record was made (although there was ample opportunity for any of the parties to demonstrate on the record that the 3.849 percent figure was no longer a useful index to the cost of debt capital). Moreover, if the cost of debt as calculated by the Commission is now dated, there are remedies available to the appellants under the Commission's order, of which they are fully aware, that do not involve setting aside altogether the results of the Commission's 15-year inquiry into the proper level of car hire rates.[24]

[24] The Commission asked the carriers to give the prescribed per diem rates "a fair opportunity, through practical application." It said that they would be expected to try to reconcile any differences that might develop among them after a fair opportunity had been given before calling on the Commission to modify the presented rates. The way was clearly left open for Commission action to modify the rates should such action become necessary. (332 I.C.C. at 256-57; see also *id.* at 230, 234).

The other specific point sought to be made by the Nebraska appellants depends upon wrenching a quotation from the Commission's opinion out of its context. Before the Commission the Nebraska appellants urged that the cost of equity capital determined as it would be in a rate case in which a cost of capital approach to rate of return was used should be used to compute the return to be allowed to car owners on the unfinanced or down-payment component of car acquisition costs. The Commission explained in detail, as its hearing examiner had also explained, why the use of that method is inappropriate in determining how much carriers should pay one another for the use of one another's equipment. (332 I.C.C. at 211-13; Appendix D to Jurisdictional Statement, No. 343, p. D86). The Commission summed up by saying that "freight cars are built to meet anticipated needs of shippers and to earn freight revenues, and that little consideration, if any, is given to the possible income from per diem payments in the decision to acquire cars." (332 I.C.C. at 212-13).

In addition, the Commission said, in reference to the cost of capital approach urged by the appellants, that "no evidence is of record on this point." (332 I.C.C. at 212). That is the quotation the appellants seize upon in their argument. But the Commission was merely saying that, even if the appellants' proposed method of determining the cost of equity capital were not rejected, the figures were not available to make the kind of equity cost analysis they urged. The Commission clearly was not saying that there was no evidence to support its own determination of the proper return on the equity portion of freight cars. The Commission found affirmatively that a return of 4 percent after federal income taxes is reasonably related to the return generally available from investments hav-

ing similar risks. It noted that railroads earned a return from freight service of 4.5 percent after taxes in 1960 and noted further "our conclusions in cases of similar reciprocal charges based upon costs, that 4 percent after taxes produced a fair return on value." The rate of 9 percent before taxes that the Commission in fact allowed on the equity portion of freight car acquisition costs produces, according to the Commission, approximately 5.5 percent after taxes. This is higher than the 4 or 4.5 percent the Commission mentioned as a reasonable rate so that, among other things, car owners will be compensated for the impact of inflation on their car costs. (332 I.C.C. at 213).

The Commission made reasoned findings on the return element of car costs that are based upon substantial evidence. The argument to the contrary is without merit.

III. The Commission Had Unquestionable Authority To Determine Car Hire Rates for the Past for the Benefit of the Courts

We turn in this section and the succeeding sections of this motion to the arguments of the Massachusetts appellants, the appellants in No. 343.

The Massachusetts appellants contend that the Commission had no power to determine reasonable past period car hire rates. In doing so they reiterate their principal contention in the previous review proceeding, a contention that was rejected by the district court and not passed upon by this Court. (See pp. 6-8, *supra*).[25] They advanced the contention anew without

[25] The district court held that § 1(11) of the Interstate Commerce Act imposes upon railroads a duty to establish and maintain just and reasonable car hire charges and that that duty can be enforced otherwise than through the Commission's power to prescribe reasonable car hire rates for the future under § 1(14)(a). As stated

any recognition that the issue of the Commission's power to determine reasonable past period rates has been altogether changed by intervening events since the case was here before.

The change was brought about by the request made to the Commission for advice to the United States court and the state court in New York as to what reasonable car hire rates were in the period for which car hire balances were in litigation before them. These requests render unsubstantial the jurisdictional issue the appellants pose.

In specific response to these requests and solely for the purpose of the New York litigation, the Commission, having found that the AAR rates had not been shown to be just, reasonable or otherwise lawful, found that certain rates were the "just, fair, reasonable, and

---

above, however, the district court set aside the Commission's order on other grounds, and, because of the expressed willingness of the Commission to proceed pursuant to the terms of the district court's remand, this Court did not pass upon appellant's basic contention. It dismissed their appeal "without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings." 358 U.S. at 72.

Whether the "adjudicatory" issue, the shorthand term used to describe the question of the Commission's power to adjudge the reasonableness of past per diem charges, did survive the further Commission proceedings is dubious. The precise "adjudicatory" issue raised earlier was the power of the Commission to make a declaratory ruling concerning whether the industry car hire rates were reasonable and otherwise lawful. The appellants were aggrieved because the Commission's ruling was that the rates were lawful, whereas they maintained that the rates were unlawfully high. In the reopened and expanded proceedings the Commission ruled that the AAR rates had not been shown to be lawful. Thus the Commission has ruled favorably to the appellants in the matter that underlay the "adjudicatory" issue they previously raised, and they are not aggrieved.

nondiscriminatory rates, proper as daily charges for the settlement of per diem balances *by and between the parties to pending suits herein before described* [the suits in the New York courts] . . .", (332 I.C.C. at 256). (Emphasis added). These findings were not an exercise by the Commission of any asserted independent adjudicatory power. They were solely in response to the requests for advice that the Commission had received. The Commission made this crystal clear:

> "However, our findings in Docket No. 31358 as to the reasonableness of the rates charged in the past are of significance only as an aid to the courts in settling the amount of damages in the pending lawsuits." (332 I.C.C. at 183).

The court below similarly recognized the function of the findings made by the Commission with respect to per diem rates for past years, saying that "in fixing rates for past years the Commission was speaking directly to the United States District Court for the Southern District of New York and the Supreme Court of the State of New York for New York County." (Appendix F to Jurisdictional Statement, No. 343, p. F7).

There can be no doubt of the Commission's power to render advice to a court upon request concerning a matter within its competence. *El Dorado Oil Works* v. *United States*, 328 U.S. 12; *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U.S.422. Nor is there any doubt that the reasonableness of car hire charges is a matter within the Commission's competence. This is clear from Sections 1(10), 1(11) and 1(14)(a) of the Act. Indeed, the majority of the Massachusetts court in the first review proceeding held that Sections 1(10) and 1(11),

broadly defining car service and directing railroads to establish and observe "just and reasonable rules, regulations, and practices with respect to car service," empowered the Commission to act even without any judicial request. Add to this the fact that Section 1(14)(a) makes the compensation to be paid for car use one of the car service practices that the Commission is specifically authorized to regulate, and there can be no doubt that, as this Court said when a strikingly similar challenge to the Commission's authority to render advice to a court concerning the lawfulness of past practices was raised, "the 'reasonableness and legality,' of the past dealings here involved" are matters which Congress has entrusted to the Commission. *El Dorado Oil Works* v. *United States*, *supra* at 19. The New York courts deferred to the Commission, and the Commission responded appropriately. The legality of its so responding is established by the *El Dorado* cases.

Appellants apparently were far enough convinced that there was no longer any plausible basis for asserting their previous position on the "adjudicatory" issue that they did not bother even to question the Commission's jurisdiction in their argument to the Massachusetts court on review of the decision in the remanded proceedings. They raise the jurisdictional issue here apparently because of a passing comment in the opinion of that court. The court said that "the Commission in the exercise of its powers under § 1(14)(a) . . . fixed separate rates for freight car use for each year from 1953 to 1965 inclusive" and prescribed a method for calculating future car hire charges. (Appendix F to Jurisdictional Statement, No. 343, p. F3). The reference by the court to Section 1(14)(a) was natural, given the fact that the question of the source of

the Commission's jurisdiction over past-period charges had not been argued, since Section 1(14)(a) is the unquestioned source of the Commission's power to prescribe future charges. Even if Section 1(14)(a) permits prescription only of future charges, there was a more than adequate jurisdictional basis for the Commission's determination of reasonable past charges for the benefit of the courts that asked for that determination; the district court's statutory reference cannot alter that fact.

IV. There Is No Substance to the Massachusetts Appellants' Allegations of Defects in the Commission's Determination of the Proper Level of Past and Future Car Hire Charges

The Massachusetts appellants urge a number of points, all of them satisfactorily disposed of by the Massachusetts court and none of any general importance, in an attempt to support their ultimate position that the past rates determined by the Commission to be reasonable are too high and the method prescribed by the Commission for determining rates for the future will yield rates that are too high. The contrast between this position and that of the Nebraska appellants, who believe that the future rates will be too low, suggests the propriety of the balance struck by the Commission.

A. The Question of the Car Repair Deficiency Setoff

One of the elements of a cost-based car hire charge is the cost of repairing cars. Sometimes a freight car develops a need for repair when it is on a user's line. For the sake of efficiency the user makes the repair and, unless the need for the repair was caused by him, bills the owner. The billing is at rates agreed to by the railroads through the AAR. There was evidence in

the Commission proceeding that the AAR repair rates do not cover all costs that for some purposes might be allocated to the repair of a particular car: the rates cover the cost of materials and labor but include no allowance for such things as maintenance of the car repair shops (which would have to be maintained even if no foreign cars were repaired). The Massachusetts appellants take the position that there should be an adjustment in the car hire rates on account of the resulting so-called car repair deficiency. They took this position before the Commission even though there was also evidence before the Commission, which both the Commission and the court took note of, that two of the principal appellants, the Boston & Maine and the New Haven, benefited from the failure of the AAR repair rates fully to cover repair costs: more of their cars were repaired off-line than foreign cars were repaired by them. (332 I.C.C. at 191-92; Appendix F to Jurisdictional Statement, No. 343, p. F5). (Nevertheless—and this explains their position—as net car hire debtors they would benefit if an across-the-board adjustment were made in the car hire rate on account of the supposed car repair deficiency.)

One of the steps in the Commission's computation of car ownership costs was to total freight car repair costs in a test year, by whatever railroad incurred. This was the basis for the necessary computation of average per car repair costs that would enter into the car hire rates. (332 I.C.C. at 188-89). The question whether user roads were fully reimbursed for the costs they incurred in repairing other roads' cars was treated by the Commission as a matter separate from this total of repair costs and the resulting average cost per car.

The Commission found that "the determination of reasonable compensation to the owner of a freight car

for the costs of purchase and maintenance of a car which it puts into per diem service is a problem distinct from the adequacy of payments it makes to other parties for performance of some of its responsibilities. The issue of setoff payments should not be allowed to become the solution sought in this proceeding." (332 I.C.C. at 180). The Massachusetts District Court agreed. It held that it was "well within the bounds of the Commission's discretion to treat the items separately, at least until the short-haul lines make some attempt to change AAR repair rates if they think changes to their financial advantage." (The court noted in this regard that the single effort of the Boston & Maine to have an AAR billing rate changed through AAR procedures was successful.) (Appendix F to Jurisdictional Statement, No. 348, p. F6).

The appellants now profess to be satisfied that the Boston & Maine and the New Haven should be remitted to an attempt to recoup by way of counterclaim in the New York suits what they claim to have lost because of the failure of the AAR car repair reimbursement formula to cover all of the overhead and other accounting costs associated with car repair.[26] But the appellants immediately retract this purported concession by saying that the amount of the car repair deficiency should be deducted from the costs on the basis of which car hire charges are computed. To do what the appellants advocate would produce the same result as making a setoff, and not even the appellants would contend that they are entitled to both a setoff and their manner of figuring costs. However their position is stated, what the appellants seek is a credit in this pro-

[26] Whether such a counterclaim is appropriate in the New York suits is a matter of contention there.

ceeding for the supposed car repair deficiency, and the Commission's reasoned judgment, sustained by the court, is that the proceedings should not be encumbered with litigation over the propriety and amount of any such credit.

Moreover, as the example of the Boston & Maine and the New Haven themselves shows, to treat the so-called car repair deficiency either as a setoff against per diem or as a deduction from the costs on which per diem is based would result in the grossest of inequities. Those two carriers would receive the double benefit of favorable repair balances and a reduction in their car hire charges to take account of the very factor that gives them their favorable repair balances. There is no evidence that a general reduction in car hire on account of the car repair deficiency, if any, would work to compensate the railroads suffering from any such deficiency; there is substantial evidence to the contrary. In the circumstances the Commission was obviously right, as the Massachusetts court held, in treating the purported deficiency separately from cost-based car hire charges.

B. The Question of the Inclusion of the Mileage Element in Car Hire Charges for the Past

Some elements of freight car ownership costs are attributable to the passage of time and some to the use of the car. In its earlier decision the Massachusetts court set aside the Commission's order on the ground that it had not considered carefully enough the possibility of dividing car hire charges into two elements—one to compensate an owner for the time his car spends off-line and the other to compensate him for the wear and tear caused by its use off-line.

As we have seen in the discussion of the Nebraska appellants' main argument (pp. 20-21, *supra*), on remand the Commission carefully considered the wisdom of instituting a time-mileage system and did adopt it as the method of computing car hire charges for the future. For past periods, however, the Commission found that "no practicable and probative method has been demonstrated on this record by which a reliable estimate might be made as to the distribution of costs between time and mileage for individual defendants in past years, or for all railroads for years other than 1960 [the assigned test year]." (352 I.C.C. at 247). For the court below, respect for whose mandate was at stake, this was enough. The court said that "the law does not demand the impossible" and added that it was within the Commission's discretion to find reasonable rates for the past on a straight time basis rather than to add a mileage factor, "which would not be based upon data but could rest only upon surmise." (Appendix E to Jurisdictional Statement, No. 343, p. E6).

There is no need for further review of this obviously correct judgment.

C. The Question of the Adjustment for Inflation

One of the costs for which a freight car owner is reimbursed by car hire payments is the cost of the capital invested in the car. As discussed above in relation to the second question raised by the Nebraska appellants (pp. 27-31, *supra*), the Commission engaged in a thoughtful analysis of how the return element of car costs should be computed. One question was the extent to which, if at all, the loss in purchasing power of the dollar should be recognized in determin-

ing a car owner's capital costs. The Commission concluded that, because of the extent of use by railroads of borrowed funds for acquiring cars and the typical period for which funds are borrowed, an allowance for inflation on 40 percent of the original cost of cars "results in the payment by car users of just and reasonable compensation to car owners for the burden resulting from decreased purchasing power of their invested funds." (332 I.C.C. at 205). The Massachusetts appellants do not quarrel with this determination.

Their only contention on this score goes to the subsidiary question of the index used by the Commission to measure the decreased purchasing power of the dollar. The index chosen was an authoritative index of freight car prices produced by the railroads and the ICC staff. This Account No. 53 Index, as it is called, shows the relationship of prices for each year since 1914, using prices in the 1910-14 period as 100. The index for each year is a composite figure based upon the percentage of each type of car and equipment in Account No. 53, which is a property account, a part of the Uniform System of Accounts prescribed for railroads by the Commission. (332 I.C.C. at 210).

Appellants object to the use of this freight car price index and say that some other more general price index such as the Bureau of Labor Statistics' wholesale price index should have been used because the Account No. 53 Index reflects not only inflation but also the effect upon prices of improvements in freight cars. The Commission recognized this. It said that the Account No. 53 "index must be treated with caution and indications of inflation resulting from its application to original costs employed only as approximations." It noted that "these approximations decline in validity as they

are applied to more distant past years." Instead, therefore, of applying the index directly to costs, it made an allowance in the interest rate on the railroads' invested funds, "which approximates the impact indicated by the index in more recent years but modifies the indication for more distant periods." (332 I.C.C. at 210-11; see p. 31, *supra*).

Quite rightly, the district court could find no error in this. The court made the commonsense point that it is "more appropriate" to use a freight car price index as a guide to rising car acquisition costs than, for example, the general national wholesale price index. (Appendix F to Jurisdictional Statement, No. 343, p. F7). There is no justification for further review.

D. The Question of the Use of Average Costs

The Commission constructed the car hire rates it found reasonable for the past and the method it prescribed for computing them in the future on the basis of a far-ranging study by its staff of the costs associated with ownership of all the cars in the national fleet of per diem cars. Characterizing this as the use of "nationwide average costs," the appellants say that the technique is unlawful for determining the appropriate level of car hire rates for a past period. They cite *Keith Ry. Equip. Co.* v. *Association of American Railroads*, 274 I.C.C. 469, 481 (1949), for the proposition that the Commission has recognized that there is a distinction between "adjudicatory proceedings" and "rule-making proceedings" so far as the use of average costs is concerned and suggest that the case established or is representative of "orthodox principles" from which the district court deviated in approving the method employed by the Commission here. In the *Keith* case there was a single complainant, who urged

"that the reasonableness of a mileage rate cannot be determined legally with relation to any single car owner"; in response the Commission "noted that this proceeding is not concerned with rates for the future, but for a period in the past . . . ," thus apparently suggesting to the appellants that in considering past-period rates the Commission can act only on the basis of individual car owners' costs. This conclusion does not seem to follow from what the Commission said, and in any event the Commission did not rule on the point. It found the point academic because during the period in question the operating results of the complainant approximated industry results.

Thus, no rigid "orthodox principles" such as appellants purport to find in the *Keith* case are to be found there, and the district court, in approving the use of averages, did not deviate from any such principles. The Massachusetts court said that "costs are not so dissimilar that use of an average figure would work any great injustice." (Appendix F to Jurisdictional Statement, No. 343, p. F9). It thus held that the Commission had correctly applied a principle applicable to adjudicatory and rule-making proceedings alike—the principle that where averages are used in the determination of issues involving a large number of separate transactions between a large number of railroads the averages must be typical. See *United States* v. *Abilene & So. Ry.*, 265 U.S. 274; *New England Divisions Case*, 261 U.S. 184, 196-99.

The carriers that initially complained against the group now represented by the Massachusetts appellants own freight cars amounting to 88 percent of the national Class I railroad fleet of per diem cars. It was plainly in order for the Commission to take its

findings on the average ownership cost of all such cars as typical of the ownership costs of 88 percent of such cars. Moreover, the use of the national average favored the appellants. The record shows that the cars that the appellants actually used had values substantially in excess of the national average.

E. The Question of the Zone of Reasonableness

The Commission found that the rates embodied in the industry agreement since 1953 had not been shown to be reasonable. It found for each year beginning with 1953 and through 1965 a rate that was reasonable as between the litigants in the lawsuits in New York and set out a method for determining the reasonable rates in any subsequent year that may be in litigation. That was in response to the requests for advice to the two New York courts.

The Massachusetts appellants assert that the Commission did not in terms find unreasonable the rates at which some of them have been offering to settle car hire balances since 1953 and that such rates may be within a zone of reasonableness along with the Commission's rates. There are two answers. One is that the district court asked for advice as to a reasonable rate—not a range of reasonable rates—and the Commission supplied it and the New York state court with precisely what was asked for. As the Massachusetts court said, "In answering the references the Commission properly was not concerned with any possibly proper or reasonable zone or range of rates but only with a specific rate upon which awards for past use should be based." (Appendix F to Jurisdictional Statement No. 343, p. F7). Second the Commission in determining a schedule of annual reasonable rates in-

plicitly and necessarily found, insofar as it was required to make any finding on the point at all, that the rates proposed by some of the appellants were unreasonable. This is no different from the situation in which an agency prescribes a single reasonable rate to be charged to shippers and rules out all other rates as unreasonable even though before the agency acted some range of carrier-initiated rates could have been found reasonable. The Massachusetts court was clearly correct when it said that in finding that certain rates were the lawful rates it "indicated that any other rates would not meet that standard." (*Ibid.*)

V. The Substitution of Hearing Examiners Was Handled Properly by the Commission, and Appellants Have Alleged No Prejudice

Without alleging any prejudice, the Massachusetts appellants complain because nine years ago, at the request of the hearing examiner then assigned to the case, the Commission relieved him of his duties and appointed another hearing examiner in his place. This was after two prehearing conferences, concerned solely with procedural matters, had been held and before any evidence had been taken. The appellants claim that this action of the Commission violated provisions of the Administrative Procedure Act. One of these provisions, now codified as 5 U.S.C. § 556(b), is to the effect that an examiner "may at any time disqualify himself" and that in the event of a challenge to an examiner's qualifications the agency shall determine the matter. As the Commission said in response to appellants' petition after the substitution of hearing examiners took place, this provision was inapplicable because there was no suggestion of disqualification, but "this section . . . does not prevent an agency

from relieving a hearing examiner from an assignment upon his request, for such reasons as the agency considers adequate." (Appendix G to Jurisdictional Statement, No. 343, p. G5). The proposition seems unassailable. The other provision invoked by appellants is 5 U.S.C. § 3105, which provides that "hearing examiners shall be assigned to cases in rotation so far as practical. . . ." The substitute examiner may or may not have been assigned in rotation. In response to appellants' petition the Commission said that it had long since determined that "the assignment of hearing examiners in strict rotation is impracticable; indeed, impossible, if economy and efficiency in administration are to be achieved." (Appendix G to Jurisdictional Statement, No. 343, p. G5). There is no occasion for going behind the Commission's words.

The district court found this point so unsubstantial as to be unworthy of specific mention. It is certainly not worth this Court's plenary review.

CONCLUSION

For the reasons set forth above the judgments of the district courts should be affirmed.

Respectfully submitted,

Of Counsel:

JAMES A. BISTLINE
RICHARD R. BONGARTZ
JOHN H. COLBURN
LOUIS T. DUERINCK
JOHN GUANDOLO
R. D. LALANNE
DAVID G. MACDONALD
RAYMOND K. MERRILL
WILLIAM P. STALLSMITH, JR.

HUGH B. COX
WILLIAM H. ALLEN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorneys for the Railroad Appellees

October 1969

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

THE BALTIMORE & OHIO RAILROAD COMPANY, et al.,

Plaintiffs,

against

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY and BOSTON & MAINE RAILROAD,

Defendants.

Civil No. 148-323, et al.

Order Granting and Denying Motions of Plaintiffs and Defendants, and Directing Immediate Entry of Partial Summary Judgment

Defendants having moved herein for an order of this Court staying all of the actions herein, pending the final determination and after judicial review, if any, of two proceedings entitled *Chicago, B. & O. R.R. v. New York*, Docket No. 33358, and *Railroad Freight Car Per Diem Charges*, Docket No. 33145, now pending before the Interstate Commerce Commission, and said motion having come before this Court on February 9, 1960 and Plaintiffs and plaintiffs having moved herein (1) for an order of this Court granting summary judgment in plaintiffs' favor pursuant to Rules 54 and 56 of the Federal Rules of Civil Procedure, and (2) for an order of this Court striking the Fourth Affirmative Defense in defendants' Answers pursuant to Rule 12(f) of said Rules, and (3) for an order of this Court dismissing the Third Counterclaim in Defendants' Answers pursuant to Rule 12(b)(6) of said Rules and said motions having come before this Court on May 26, 1960 and May 27, 1960, and thereafter, and counsel for all parties having sub-

mitted to this Court a Joint Stipulation of Facts, with exhibits attached thereto, dated September 26, 1960, and approved by order of this Court of that date, and a Supplement to Joint Stipulation of Facts dated January 11, 1961, and thereafter supplementary exhibits filed January 13, 1961, and this Court having conducted extensive pre-trial hearings and received statements of facts, memoranda of law and affidavits filed in support of and in opposition to said motions and having heard oral argument thereon; and due deliberation having been had thereon, and upon all the pleadings and proceedings heretofore had herein and upon the opinion of this Court herein filed July 8, 1961; it is

1. Ordered, that the motion of defendants for a stay of these actions is denied; and it is

2. Further Ordered, that the motion of plaintiffs for an order granting summary judgment in plaintiffs' favor on the grounds that each defendant has failed to pay *per diem* at the rates which were at the various times set forth in the Code of Per Diem Rules—Freight for use of each plaintiff's freight cars in accordance with its obligation to each plaintiff contained in similar contracts known as "Car Service and Per Diem Agreements" is denied; and it is

3. Further Ordered, that the motions of plaintiffs to strike the Fourth Affirmative Defense and the Third Counterclaim in defendants' Answers are granted; and it is

[1] As to where this defense and this counterclaim are identified by different numbers are hereto listed, as follows:

Baltimore & Ohio Railroad v. N. Y., New [illegible] Railroad Company [illegible]	Antitrust defense is designated as fifth affirmative defense and second counterclaim
Baltimore & Ohio Railroad v. Boston & Maine Railroad [illegible]	Antitrust defense is designated as fifth affirmative defense and second counterclaim
[illegible] Valley Railroad Company v. N. Y., New Haven and Hartford Railroad Company [illegible]	Antitrust defense is designated as third affirmative defense and second counterclaim

4. FURTHER ORDERED, that partial summary judgments are hereby entered in favor of the plaintiffs in 21 of the actions herein, (a list of which actions is set forth in Appendix A hereto) and against the defendants to the extent only of declaring and adjudging that these plaintiffs are entitled to recover from defendants *per diem* in such amounts as are found by this Court to be due them based upon a rate to be found just, fair, reasonable and non-discriminatory by the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court for each month beginning with August, 1953 to date to be computed with interest; and it is

5. FURTHER ORDERED, that in the 88 actions (a list of which actions is set forth in Appendix B hereto) plaintiffs shall have partial judgments in their favor as to the liability of the defendants to said plaintiffs to the extent only of declaring and adjudging that these plaintiffs are entitled to recover from defendants *per diem* in such amounts

Lehigh Valley Railroad Company v. Boston & Maine Railroad, 18-33	Antitrust defense is dismissed as to third affirmative defense and second counterclaim
Western Maryland Railway Company v. N. Y., New Haven and Hartford Railroad Company, 18-319	Antitrust defense is dismissed as to fifth affirmative defense and second counterclaim
Western Maryland Railway Company v. Bangor & Aroostook Railroad, 18-320	Antitrust defense is dismissed as to fifth affirmative defense and second counterclaim
Missouri-Illinois Railroad Company v. Boston & Maine Railroad, 18-31	Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim
Missouri Pacific Railroad Company v. N. Y., New Haven and Hartford Railroad Company, 18-10	Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim
Missouri Pacific Railroad Company v. Boston & Maine Railroad, 18-30	Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim
Texas and Pacific Railway Company v. N. Y., New Haven and Hartford Railroad Company, 18-30	Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim
Texas and Pacific Railway Company v. Boston & Maine Railroad, 18-32	Antitrust defense is dismissed as to fifth affirmative defense and third counterclaim

as are found by this Court to be due them based upon a rate to be found just, fair, reasonable and non-discriminatory by the Interstate Commerce Commission, of which said Commission shall advise this Court and thereafter to be ultimately determined and fixed by this Court, for each month beginning with August, 1953, to date, to be computed with interest.[2] The entry of a final money judgment in favor of all plaintiffs, however, is stayed pending determination by the Interstate Commerce Commission of the *per diem* rate controversy in Docket No. 31358 presently there pending or until further order of this Court; and it is

6. FURTHER ORDERED, that the plaintiffs (a list of whom is annexed hereto as Exhibit C) with their consent are directed to amend their complaint in Docket No. 31358 to request the Interstate Commerce Commission, without regard to the proceeding pending in Docket No. 23145, to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with August, 1953, to date, for the purpose of the suits consolidated herein; and it is

7. FURTHER ORDERED, that the plaintiffs (a list of whom is annexed hereto as Exhibit D) with their consent are directed to petition for leave to intervene in said Docket No. 31358 for the purpose of requesting the Interstate Commerce Commission, without regard to the proceeding pending in Docket No. 23145, to advise this Court what *per diem* rate was just, fair, reasonable and non-discriminatory for each month beginning with August, 1953, to date, for the purpose of the suits consolidated herein; and it is

8. FURTHER ORDERED, that the plaintiffs herein be and hereby with their consent are directed within thirty days to amend their complaint or to petition for leave to in-

[2] Except in those actions where the plaintiffs have expressly agreed to waive their right to interest. Such determinations will be made at the time of entry of individual judgments in those actions.

tervene, as the case may be, in said Docket No. 31358 and the parties hereto be and hereby are directed to proceed with all reasonable dispatch, consistent with the procedures of the Interstate Commerce Commission, to the end that this Court be advised as to the just, fair, reasonable and non-discriminatory *per diem* rates as expeditiously as possible; and it is

9. FURTHER ORDERED, that the Court hereby retains jurisdiction for all purposes of the suits consolidated herein; and it is

10. FURTHER ORDERED, that the plaintiffs are directed to file with the Interstate Commerce Commission in said Docket No. 31358 a certified copy of this Order and to request for the Court its consideration and the advice sought; and it is

11. FURTHER ORDERED, that because of the important controlling questions of law involved herein as to which there is substantial ground for difference of opinion and because an immediate appeal from this order may materially advance the ultimate termination of the litigation, all questions raised herein are to be considered certified by me in accordance with the provisions of Section 1292(b), Title 28 U. S. Code; and it is

12. FURTHER ORDERED, that the opinion of this Court filed herein on July 5, 1961, and the Joint Stipulations of Fact filed by the parties herein on September 29, 1960 and January 11, 1961, shall constitute findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and shall be the equivalent of the Court's reasons for the immediate entry of partial summary judgment as herein granted, without further delay (Rule 54, Federal Rules of Civil Procedure).

Dated: New York, New York
June 15, 1962

(Sgd.) SYLVESTER J. RYAN
United States District Judge